A **DATUK SERI ANWAR IBRAHIM v. KERAJAAN MALAYSIA & ANOR**

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
AHMADI ASNAWI JCA
B BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: W-01(A)-416-10-2016]
22 FEBRUARY 2018

C ***CONSTITUTIONAL LAW:*** *Legislation – Constitutionality – Challenge against constitutionality of National Security Council Act 2016 ('NSCA') – Whether High Court seised with jurisdiction to hear application – Whether challenge on Parliament's power to legislate – Whether offended 'basic structure' of Federal Constitution ('FC') – Whether leave under art. 4 of FC required – Federal Constitution, arts. 66(4), 128 & 149*

D The appellant, *vide* an originating summons ('OS'), sought to challenge the constitutionality of the National Security Council Act 2016 ('NSCA'). The NSCA had become law by virtue of art. 66(4A) of the Federal Constitution ('Constitution'). Under that article, a Bill which is not assented to by the Yang di-Pertuan Agong within the time specified under art. 66(4), which is E stipulated as 30 days, shall become law as if it had been assented to. The appellant contended that art. 66(4A) is unconstitutional because the amendment offended the 'basic structure' of the Constitution and therefore, the NSCA, which became law under that provision, was unconstitutional, null and void. The appellant further contended that the NSCA, being a F security legislation, may be validly enacted only pursuant to art. 149, the only provision in the Constitution that empowers and allows the enactment of a security legislation. As the NSCA was not legislated pursuant to art. 149, it was not constitutional and not a valid law. The appellant also sought an interim injunction to restrain the respondents from taking action under the G NSCA, pending the disposal of the OS. The High Court Judge ('HCJ') dismissed the application for an interim injunction as well as the OS on the preliminary objection raised by the respondents that the High Court was not seised with jurisdiction to hear or determine the application, because it fell within the scope of art. 4(3) and (4) of the Constitution, the jurisdiction of which, is exclusively with the Federal Court under art. 128. Hence, the H appeal. It was the appellant's submission that the HCJ had erred in finding herself lacking the necessary jurisdiction, relying on the Federal Court decision in the *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri*, contending that the Federal Court had, in that decision,

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wrongly interpreted *Ah Thian v. Government of Malaysia* ('*Ah Thian*'). Stating that the case fell squarely within *Ah Thian*, the appellant submitted that the HCJ had erred in submitting that the application was a challenge on Parliament's legal competence, or for lack of power to legislate. The challenge in this application was an ordinary challenge, taken in the usual way, to question the constitutionality of a statute which a High Court has the necessary jurisdiction to deal with. Therefore, there was no necessity to obtain leave pursuant to art. 4(3) and (4) as decided by the Federal Court in that case.

Held (dismissing appeal; affirming decision of High Court)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) Under art. 4(3), the validity of any law can only be questioned on the ground that the respective legislatures have no power to make law under three types of proceedings: (i) in proceedings for a declaration that the law is invalid on the ground that the Parliament has no power to make law; or (ii) if it is Federal law, in proceedings between the Federation and one or more states; or (iii) if it is state law, in proceedings between the Federation and that State. Where the challenge is on the Legislature's lack of power to legislate, inevitably, leave under art. 4 becomes necessary. However, a challenge plainly on unconstitutionality of a law which is within the legislative competence but for offending the constitutional provisions is not one that falls under the scope of art. 4(3) and (4). (paras 12 & 17)

(2) The challenge by the appellant arose when the NSCA becomes law by virtue of art. 66(4) of the Constitution wherein the appellant contended that but for art. 66(4), the Parliament has no power to pass the NSCA as law. In comparison, the appellant in *Ah Thian* was attacking the validity of the Firearms (Increased Penalties) (Amendment) Act 1974 for being unconstitutional in contravention of art. 8 of the Constitution, not on the ground that it related to a matter which Parliament has no power to make law. It was found in that case that Parliament had the necessary legislative competence to enact the law with respect to criminal law and administration of justice and would not call for the invocation of art. 4 of the Constitution. (paras 26-27)

(3) Article 149 allows Parliament to enact laws for purposes of preventing situations stipulated under art. 149(1)(a) to (f) of the Constitution, if the laws recites that action has been taken, or threatened by any substantial body of persons. Such laws may be enacted inconsistent with the provisions of arts. 5, 9, 10 or 13, or would be outside the legislative power of the Parliament, apart from art. 149 itself. The argument of the

appellant that NSCA may only be enacted pursuant to art. 149 since it relates to security, must necessarily mean that the law-making power of Parliament itself had been questioned. Therefore, the application fell within the purview of art. 4. (para 33)

(4) The questioning of the amendment under art. 159 was premised on the 'basic structure' doctrine *ie*, that the original s. 66(4) was the basic structure of the Constitution that had been altered. Such challenge, in substance, questioned the validity of the law made by Parliament, in that, Parliament cannot amend any of the fundamental liberties provision beyond what is expressly permitted by Part II itself and was a proceeding envisaged by art. 4(3) (*Loh Kooi Choon v. Government of Malaysia*). (paras 34-35)

(5) In seeking the reliefs, the appellant was questioning the power of Parliament to legislate the impugned laws which fell squarely under art. 4 read with art. 128 and was therefore, within the exclusive jurisdiction of the Federal Court. In the circumstances, the appellant's application questioned the lack of power of Parliament and called for the invocation of art. 4 of the Constitution. (paras 36-37)

***Bahasa Malaysia** Headnotes*

Perayu, melalui saman pemula ('SP'), memohon mencabar keperlembagaan Akta Majlis Keselamatan Negara 2016 ('Akta'). Akta tersebut dijadikan undang-undang menurut per. 66(4A) Perlembagaan Persekutuan ('Perlembagaan'). Bawah perkara itu, satu Rang Undang-Undang yang tidak diperkenan oleh Yang di-Pertuan Agong dalam tempoh masa yang dinyatakan bawah per. 66(4A), iaitu 30 hari, akan menjadi undang-undang seolah-olah telah diberi perkenan. Perayu menghujahkan bahawa per. 66(4A) tidak berperlembagaan kerana pindaan tersebut bercanggah dengan 'struktur asas' Perlembagaan dan oleh itu, Akta tersebut, yang menjadi undang-undang bawah peruntukan tersebut, tidak berperlembagaan, batal dan tidak sah. Perayu selanjutnya menghujahkan Akta tersebut, sebagai perundangan keselamatan, boleh digubal dengan sah hanya menurut per. 149, satu-satunya peruntukan dalam Perlembagaan yang memberi kuasa dan membenarkan penggubalan perundangan keselamatan. Oleh sebab Akta tersebut tidak digubal menurut per. 149, Akta itu ialah undang-undang yang tidak berperlembagaan dan tidak sah. Perayu juga memohon injunksi interim untuk menghalang responden-responden daripada mengambil tindakan bawah Akta, sementara SP dilupuskan. Hakim Mahkamah Tinggi ('HMT') menolak permohonan injunksi interim serta SP berdasarkan bantahan awalan yang dibangkitkan responden-responden bahawa Mahkamah Tinggi tidak berbidang kuasa membicarakan atau memutuskan permohonan tersebut,

kerana permohonan itu terangkum dalam ruang lingkup per. 4(3) dan (4) Perlembagaan, dan bidang kuasa itu secara eksklusif terletak pada Mahkamah Persekutuan bawah per. 128. Oleh itu, rayuan ini. Perayu menghujahkan HMT terkhilaf apabila mendapati beliau tiada bidang kuasa yang diperlukan, berdasarkan keputusan Mahkamah Persekutuan dalam *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri*, menghujahkan bahawa Mahkamah Persekutuan tersalah tafsir *Ah Thian v. Government of Malaysia* ('*Ah Thian*'). Dengan hujahan kes ini serupa dengan kes *Ah Thian*, perayu menyatakan HMT terkhilaf apabila menyatakan bahawa permohonan tersebut adalah cabaran atas kekompetenan undang-undang Parlimen, atau untuk ketiadaan kuasa menggubal. Cabaran dalam permohonan ini adalah cabaran biasa yang dibuat secara biasa untuk menyoal keperlembagaan statut yang Mahkamah Tinggi mempunyai bidang kuasa untuk tangani. Dengan itu, tiada keperluan untuk memperoleh kebenaran menurut per. 4(3) dan (4) seperti yang diputuskan oleh Mahkamah Persekutuan dalam kes itu.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)

Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Bawah per. 4(3) kesahan apa-apa undang-undang hanya boleh dipersoalkan atas alasan perundangan tersebut tiada kuasa membuat undang-undang bawah tiga bentuk prosiding: (i) dalam prosiding untuk pengisytiharan bahawa undang-undang itu tidak sah atas alasan Parlimen tiada kuasa membuat undang-undang; atau (ii) jika itu adalah undang-undang Persekutuan, dalam prosiding antara Persekutuan dan salah satu atau lebih, Negeri; atau (iii) jika itu ialah undang-undang Negeri, dalam prosiding antara Persekutuan dan Negeri. Apabila cabarannya berkait dengan ketiadaan kuasa pada perundangan untuk menggubal, kebenaran bawah per. 4 menjadi satu kemestian. Walau bagaimanapun, satu cabaran yang jelas, berdasarkan undang-undang tak berperlembagaan yang dalam rangkuman kekompetenan perundangan tetapi bukan percanggahan peruntukan-peruntukan perlembagaan tidak terangkum dalam ruang lingkup per. 4(3) dan (4).

(2) Cabaran oleh perayu berbangkit apabila Akta menjadi undang-undang melalui per. 66(4) Perlembagaan iaitu perayu menghujahkan bahawa jika bukan kerana per. 66(4), Parlimen tiada kuasa meluluskan Akta sebagai undang-undang. Sebagai perbandingan, perayu dalam *Ah Thian* mencabar kesahan Akta Senjata Api (Penalti Lebih Berat) (Pindaan) 1974 kerana tidak berperlembagaan bercanggah dengan per. 8

Perlembagaan, bukan atas alasan berkait dengan perkara yang Parlimen mempunyai kekompetenan perundangan yang diperlukan untuk menggubal undang-undang berkaitan undang-undang jenayah dan pentadbiran keadilan dan tidak memerlukan per. 4 Perlembagaan dibangkitkan.

(3) Perkara 149 membenarkan Parlimen menggubal undang-undang untuk menghalang situasi yang dinyatakan bawah per. 149(1)(a) hingga (f) Perlembagaan, jika undang-undang menyatakan bahawa tindakan diambil, atau diancam oleh mana-mana kumpulan. Undang-undang sedemikian boleh digubal tidak konsisten dengan peruntukan-peruntukan per. 5, 9, 10 atau 13, atau luar kuasa perundangan Parlimen, selain daripada per. 149 itu sendiri. Hujahan perayu bahawa Akta hanya boleh digubal menurut per. 149 kerana berkait dengan keselamatan, semestinya membawa maksud bahawa kuasa pembuatan undang-undang Parlimen sendiri telah dipersoalkan. Dengan itu, permohonan ini terangkum dalam ruang lingkup per. 4.

(4) Mempersoalkan pindaan bawah per. 159 berdasarkan doktrin 'struktur asas' iaitu, s. 66(4) asal adalah struktur asal Perlembagaan yang diubah. Cabaran itu, pada asasnya, mempersoalkan kesahan undang-undang yang dibuat Parlimen, iaitu, Parlimen tidak boleh meminda apa-apa peruntukan keadilan asasi melampaui apa yang dibenarkan secara langsung dalam Bahagian II itu sendiri dan adalah prosiding yang dibayangkan dalam per. 4(3) (*Loh Kooi Choon v. Government of Malaysia*).

(5) Dalam memohon relief-relief, perayu mempersoalkan kuasa Parlimen menggubal undang-undang tersebut yang terangkum bawah per. 4 dibaca bersama-sama dengan per. 128 dan oleh itu, terangkum dalam bidang kuasa eksklusif Mahkamah Persekutuan. Dalam keadaan itu, permohonan perayu mempersoalkan ketiadaan kuasa Parlimen dan membangkitkan per. 4 Perlembagaan.

Case(s) referred to:

Abdul Karim Abdul Ghani v. The Legislative Assembly of The State of Sabah [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1 SC ***(refd)***

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(dist)***

Kesavananda Bharati Sripadagalvaru & Ors v. State of Kerala & Another [1973] 1 SCR Supp 1 ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

Mark Koding v. PP [1982] 1 LNS 15 FC ***(refd)***

Rethana M Rajasigamoney v. The Government of Malaysia [1984] 1 CLJ 352; [1984] 1 CLJ (Rep) 323 FC ***(refd)***

State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors [2015] 8 CLJ 975 FC ***(refd)***

The Government of Malaysia v. Robert Linggi [2015] 1 LNS 1515 CA ***(refd)***
Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 6 CLJ 541 FC ***(foll)***
Yeoh Tat Thong v. Government of Malaysia & Anor [1973] 1 LNS 180 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 4(3), (4), 5(1), (4), 8(1), (2), 9(2), 10(1)(a), 11(4), 13, 63, 66(4), (4A), 128(1), 149(1)(a), (b), (c), (d), (e), (f), 159 Ninth Schedule List II item 4
Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988, s. 9
Rules of Court 2012, O. 7 r. 3
Rules of the High Court 1980, O. 53 r. 3
Syariah Criminal (Negeri Sembilan) Enactment 1992, s. 66

For the appellant - Gopal Sri Ram, Latheefa Koya & Damien Chan; M/s Daim & Gamany
For the respondents - Amarjeet Singh Serjit Singh & Suzana Atan; SFCs

[Editor's note: For the High Court judgment, please see Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia & Anor [2017] 6 CLJ 311 (affirmed).]

Reported by S Barathi

JUDGMENT

Rohana Yusuf JCA:

[1] By an originating summons dated 20 October 2016, the appellant applied to the High Court at Kuala Lumpur for:

1. A declaration that section 12 of the Constitution (Amendment) Act 1983 (A566), section 2 of the Constitution (Amendment) Act 1984 (A584) and section 8 of the Constitution (Amendment) Act 1994 (A885) are unconstitutional, null and void and of no effect;
2. A consequential declaration that Article 66(4) and (4A) as introduced by the Constitutional (Amendment) Act 1994 (A885) is unconstitutional, null and void and of no effect;
3. A declaration that the National Security Council Act 2016 is unconstitutional, null and void and of no effect;
4. An injunction perpetually restraining the 2nd defendant from taking or purporting to take any step or from acting or purporting to act pursuant to the National Security Council Act 2016;
5. Such further and other declaration be granted consequent upon the relief claimed herein;
6. That there be no order as to costs.

[2] In essence, the originating summons (OS) seeks to challenge the constitutionality of the National Security Council Act 2016 (NSCA). The NSCA had become law by virtue of art. 66(4A) of the Federal Constitution. Under that article, a Bill which is not assented to by the Yang di-Pertuan Agong within the time specified under art. 66(4) which is stipulated as 30 days, shall become law as if it had been assented to. The appellant firstly contended that art. 66(4A) is unconstitutional because the amendment of it offended the "basic structure" of the Federal Constitution. Following thereto, the NSCA which becomes law under that provision, is therefore unconstitutional, null and void.

[3] The next ground of unconstitutionality of the NSCA as contended by the appellant is on the premise that the NSCA being a security legislation, may be validly enacted only pursuant to art. 149. Article 149 being the only provision in the Federal Constitution that empowers and allows the enactment of a security legislation. As the NSCA is not legislated pursuant to art. 149, it is not constitutional and not a valid law. The appellant also sought for an interim injunction to restrain the respondents from taking action under NSCA, pending the disposal of the OS.

[4] The learned High Court Judge dismissed the application for an interim injunction as well as the OS on the preliminary objection raised by the learned Senior Federal Counsel (SFC) that the High Court is not seised with jurisdiction to hear or determine the application, because it falls within the scope of art. 4(3) and (4) of the Federal Constitution. The jurisdiction of which, is exclusively with the Federal Court under art. 128. In coming to that conclusion, the learned judge held herself bound by the majority judgment in *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541; [2014] 4 MLJ 765 and consequently dismissed the OS. Aggrieved by that decision, the appellant is now appealing.

[5] Learned counsel for the appellant Datuk Sri Gopal Sri Ram (Latheefa Koya and Damien Chan with him) first of all submitted that the learned judge had erred in finding herself lacking the necessary jurisdiction, relying on the Federal Court decision in the *Titular Roman Catholic Archbishop (supra)*. Learned counsel submitted that the Federal Court had in that decision wrongly interpreted *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112, having regard to the view expressed by the Federal Court in *Mark Koding v. PP* [1982] 1 LNS 15; [1982] 2 MLJ 120, *Ah Thian (supra)* and *Yeoh Tat Thong v. Government of Malaysia & Anor* [1973] 1 LNS 180; [1973] 2 MLJ 86.

[6] Learned counsel had impressed upon us that, the challenge made in the application herein is an ordinary challenge taken in the usual way, to question the constitutionality of a statute which a High Court has the necessary jurisdiction to deal with. The learned trial judge, it was submitted had therefore erred in saying that the application is a challenge on the Parliament's legal competence, or for lack of power to legislate. Learned counsel reiterated that the application herein falls squarely within *Ah Thian (supra)*. There is therefore no necessity to obtain leave pursuant to art. 4(3) and (4) as decided by the Federal Court in that case.

[7] Learned SFC Dato' Amarjeet Singh (Suzana Atan with him) on the other hand contended otherwise. Learned SFC maintained that the scope of challenge in the OS comes within art. 4(3) and (4) of the Federal Constitution, which requires leave of the Federal Court. Hence the learned trial judge was correct to deny jurisdiction.

[8] As a start, we begin with a close examination of the Federal Court decision in *Ah Thian*, which has been quoted very often as an authority on the issue at hand. At p. 113 (MLJ) the late Tun Suffian LP in that case has stated:

> The applicant wants to attack the validity of the Firearms (Increased Penalties) Act not on the ground that it relates to a matter with respect to which Parliament has no power to make law. In my judgment this Act deals with both criminal law and administration of justice, both matters with respect to which Parliament has power to make law (see item 4 of List 1 in the Ninth Schedule to the Constitution). The applicant says that the Act is invalid because it is inconsistent with the Constitution … Therefore clause (4) of Article 4 and clause (1) of Article 128 do not apply and the point may be raised in the ordinary way in the course of submission, and determined by the High Court, without reference to the Federal Court, and there is no need for leave of a Judge of the Federal Court.

[9] From the above paragraph, it appears that the Federal Court paid emphasis and drew a distinction on the nature of the challenge made before invoking art. 4. There is to be a distinction between a challenge on the basis that the Parliament lacks the power to legislate with that the Parliament exceeds its power in legislating. This interpretation according to learned counsel is in accord with the earlier Federal Court decision in *Yeoh Tat Thong v. Government of Malaysia & Anor* [1973] 1 LNS 180; [1973] 2 MLJ 86. This was a case where the applicant therein sought for a declaration that the subsidiary legislations made by the State Authority of Penang under the provision of the National Land Code was *ultra vires*, null and void. The applicant applied for leave pursuant to art. 4, but was dismissed as the

A Federal Court held that there was no necessity for leave because the impugned law being challenged, was not primary law made by the State Legislature and the challenge was not on the ground that there was a trespass on the federal sphere.

[10] The case of *Mark Koding* which was decided after *Ah Thian*, involved
B a challenge on the amendment to the Sedition Act and to art. 63. It was argued that these laws had limited the right to freedom of speech in the Parliament. The Federal Court speaking through Suffian LP held the view that the amendment to the Sedition Act and art. 63 have validly limited the freedom of speech in the Parliament. The Federal Court having found it
C against the appellant in that case, had observed at p. 123 (MLJ) of the judgment that:

> Secondly we would observe that it would have been better if the learned Judge had not referred this matter to us but instead had himself decided the constitutional question which arose (he had the jurisdiction to do so:
D *Fernandez v. Attorney General*) …

[11] The Federal Court case of *Rethana M Rajasigamoney v. The Government of Malaysia* [1984] 1 CLJ 352; [1984] 1 CLJ (Rep) 323; [1984] 2 MLJ 52, questioned the validity of the Employees' Social Security Act 1969 as being unconstitutional, which brought the question of whether leave of a Federal
E Court Judge was necessary under art. 4(3) and (4) read with art. 128. The appellant in that case was challenging and seeking for a declaration that certain provisions in the Act were inconsistent with some constitutional provisions and the impugned Act was void to the extent of the inconsistencies. The Federal Court found that leave under art. 4 was unnecessary because the
F Act was not challenged on the ground that the Parliament had no power to enact but that some provisions were not consistent with the Federal Constitution. This, according to the Federal Court was well within the original jurisdiction of the High Court, hence no leave was then required.

[12] Thus far, it is clear from the decisions outlined above that the basis
G of challenge matters, before it can be decided whether to invoke art. 4 or otherwise. In cases where the challenge is on the Legislature's lack of power to legislate, inevitably leave under art. 4 becomes necessary. However, a challenge plainly on unconstitutionality of a law which is within the legislative competence but for offending the constitutional provisions is not
H one that falls under the scope of art. 4(3) and (4).

[13] In *Titular Roman Catholic Archbishop*'s case, one of the issues raised before the High Court was on the validity of s. 9 of the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988, which was commonly found in the various State Enactments (the impugned provision).

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This section of the State Enactments seeks to control and restrict the propagation of non-Islamic religious doctrine and belief amongst Muslims and contained a provision which prohibits the use of *inter alia* the word Allah, in any published writings, speeches or statement, or speeches addressed at gathering of persons, etc. The validity and constitutionality of the impugned provision was challenged at the High Court.

[14] The learned High Court Judge found the impugned section invalid, null and void and unconstitutional because it exceeded the object of art. 11(4) of the Federal Constitution. On this issue, the Federal Court at para. 39 observed that:

> The net effect of the finding of the learned High Court Judge is that the impugned provision is invalid, null and void, and unconstitutional as it exceeds the object of Article 11(4) of the Federal Constitution. The respective States' Legislature thus has no power to enact the impugned provision. The issue is, whether could the High Court Judge entertain such a challenge in light of specific procedure in clauses (3) and (4) of the Federal Constitution …

[15] Having found that the ground of challenge in *Titular Roman Catholic Archbishop* was a challenge on the ground that "The respective States' Legislature (thus) has no power to enact the impugned provision", the Federal Court referred to *Ah Thian* and held that the application made in *Titular Roman Catholic Archbishop* was what was classified by *Ah Thian* as the proceedings of type (a) illustrated in that case. Hence leave under art. 4 becomes necessary. In *Ah Thian,* the Federal Court had also lucidly explained how a written law can be invalidated under the Federal Constitution. It was stated there that the court has power to declare any Federal or State law invalid on any of the three grounds below:

> 1) In the case of Federal written law, because it relates to matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter with respect to which the State legislature has no power to make law, Article 74; or
>
> 2) In the case of both Federal and State written law, because it is inconsistent with the Constitution, see Article 4(1); or
>
> 3) In the case of State written law, because it is inconsistent with Federal law, Article 75.

[16] It was further explained that there would be no restriction on any court to declare any law invalid on grounds (2) and (3) above, be it, being challenged by the Government or by an individual. The restriction only relates to a power to declare any law invalid on ground (1) which is subject to three constitutional restrictions, found in art. 4(3).

[17] Under art. 4(3) the validity of any law can only be questioned on the ground that the respective Legislatures have no power to make law under three types of proceedings:

a) in proceedings for a declaration that the law is invalid on the ground that the Parliament has no power to make law; or

b) if it is Federal law, in proceedings between the Federation and one or more States; or

c) if it is State law, in proceedings between the Federation and that State.

[18] Learned counsel contended that in classifying the challenge on the impugned law in *Titular Roman Catholic Archbishop* as falling under type (a) proceedings as enunciated by the Federal Court in *Ah Thian*, the Federal Court is therefore saying that whether the ground of challenge is on the basis that the Legislature has no power, is the same thing as challenging it on the ground that the Parliament has exceeded its power. Specific reference was made in relation to the object of art. 11(4) of the Federal Constitution. For this reason, learned counsel submitted that the Federal Court in *Titular Roman Catholic Archbishop* had wrongly interpreted *Ah Thian*.

[19] Learned SFC did not vehemently oppose the submission of learned appellant's counsel on the interpretation of *Ah Thian* by the Federal Court in the *Titular Roman Catholic Archbishop*'s case. It was conceded by learned SFC that, that case had read the phrase "the relevant Legislature has no power to make law" in cl. (3) to art. 4 to cover also situations where the relevant Legislature exceeds the power within its legislative competence.

[20] Learned SFC's submission would suggest that the interpretation given by the Federal Court had effectively blurred the line between challenges made on the reason that the Parliament had no power to legislate with the reason that the Parliament had exceeded its jurisdiction.

[21] As we had alluded to earlier, the Federal Court in that judgment at para. 39 remarked that a finding by the High Court Judge that the impugned provision was held invalid, null and void for exceeding the object of art. 11(4), means the High Court was saying that the State Legislature has no power to enact the impugned provision. In other words, the Federal Court first found the net effect of that challenge amount to a challenge on the State legislative power which calls for the invocation of art. 4. In short, the application of art. 4 comes into play when a challenge posed is a challenge on the lack of power on the part of the State Legislature to legislate and not so much of equating both types of challenge to be made under art. 4.

[22] The Federal Court case of *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors* [2015] 8 CLJ 975; [2015] 6 MLJ 763 involved a challenge on s. 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 which was said to be inconsistent with arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution. The application was made by way of judicial review pursuant to O. 53 r. 3 of the then Rules of the High Court 1980, in the High Court at Seremban, where it was dismissed. The Court of Appeal allowed the appeal overruling the High Court. At the Federal Court, the challenge on the validity of the law in this case was held to be taken wrongly by way of a collateral attack, referring to *Titular Roman Catholic Archbishop* and *Abdul Karim Abdul Ghani v. The Legislative Assembly of The State Of Sabah* [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1; [1988] 1 MLJ 171.

[23] There were rival arguments by parties before the Federal Court in that case as to whether the challenge was in fact on the ground that the State Legislature has no power or that it had exceeded its legislative power. The Federal Court held that the challenge on the validity of the law in that case, which was made by way of collateral attack instead of adhering to the requirement of art. 4 of the Federal Constitution was wrong. The challenge by the applicant in that case on the ground that the State Enactment was in contravention of certain provisions of the Constitution therefore must be made under art. 4, because it questioned the legislative power of the States.

[24] Learned counsel for the appellant had also submitted that the learned High Court Judge at para. 25 of the judgment had erred in applying the case of *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili bin Mohd Khamis & Ors (supra)* because that case involves the issue of Federal and State Legislatures. This issue was addressed at para. 27 of the judgment where Raus Sharif PCA (now CJ) stated this:

> … The respondent's argument, that the legislation on Islamic Law passed by State Legislature must comply with the provision on fundamental liberties in arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution, is an argument that directly questions the legislative powers of the State Legislature. For all intent and purpose, it was a direct challenge to the validity or constitutionality of s. 66 passed by the State Legislature of Negeri Sembilan. As stated earlier, such a challenge must be in accordance with the specific procedure as specified in clauses (3) and (4) of Article 4 the Federal Constitution.

We agree with learned appellant's counsel that the Federal Court found the challenge of the statutes in the case was on the legislative competence of the State Legislature and therefore required the necessary leave under art. 4.

[25] Learned SFC had cited to us that, post – *Titular Roman Catholic Archbishop*'s cases would show clearly the legal position of this issue. First the Court of Appeal decision in *The Government of Malaysia v. Robert Linggi* [2015] 1 LNS 1515, then the *State Government of Negeri Sembilan & Ors.* Amongst the challenges posed in *Robert Linggi* was on the validity of ss. 15 and 16 of the Constitution (Amendment) Act 1994, which have the effect of removing the requirement of the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak, to appoint Judicial Commissioners. The Court of Appeal observed at para. 66 that the "The plaintiff's challenge is in substance a challenge to the validity of ss. 15 and 16 of the Amending Act on the basis that the Parliament had enacted a Federal law which made provision with respect to a matter which, by virtue of the concurrence of the Yang di-Pertua Negeri of Sabah and Yang di-Pertua Negeri of Sarawak not having been obtained, it (Parliament) had no power to enact". And then concluded that the challenge therefore would fall within the scope of art. 4, cls. (3) and (4) of the Federal Constitution.

[26] Having perused through all the decided authorities cited before us, we have difficulties firstly in agreeing with learned appellant's counsel that the application herein is the same kind as the one in *Ah Thian*. In our view there is a basic distinction between the application in this appeal with that of *Ah Thian*. In *Ah Thian,* the application was purely on whether the Firearms (Increased Penalties) (Amendment) Act 1974 was *ultra vires* the Federal Constitution as it contravened art. 8(1). The Federal Court had observed that there was no challenge by *Ah Thian* that the Parliament has no power to make law. It was firstly found that the Parliament had the necessary legislative competence to enact the law with respect to criminal law and administration and would not call for the invocation of art. 4.

[27] Whereas in the instant appeal, the challenge arose when NSCA becomes law by virtue of art. 66(4) of the Federal Constitution. Thus, what the appellant is saying is that, but for art. 66(4) the Parliament has no power to pass the NSCA as law. We found ourselves in agreement with learned SFC that the two main basis for saying that NSCA is not a valid statute cannot be anything else but a challenge, on the power of Legislature to legislate. In comparison, the appellant in *Ah Thian* was attacking the validity of the Firearms (Increased Penalties) Act for being unconstitutional in contravention of art. 8 of the Federal Constitution, not on the ground that it relates to a matter which the Parliament has no power to make law. As observed by the Federal Court, the impugned Act in that case dealt with criminal law and the administration of justice, which are within the legislative competence of the Parliament as found in item 4 of List 1 in the Ninth Schedule to the Federal Constitution. The challenge on the validity

was purely on the ground that it is inconsistent with the Constitution. Therefore cl. (4) of art. 4 and cl. (1) of art. 128 do not apply and the point may be raised in the ordinary way even in the course of submission, and may be determined in the High Court, without reference to the Federal Court.

[28] There is no doubt that in *Ah Thian*, the challenge was in fact under the second category referred to by the Federal Court in that case as "in the case of both Federal and State written law, because it is inconsistent with the Constitution". It is not as plain and clear in the present appeal.

[29] We find it appropriate to refer to the decision of the Federal Court in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187. The Federal Court found the challenge made by the appellant in *Loh Kooi Choon (supra)* was in substance, questioning the validity of the impugned law on the ground that the Parliament makes provision with respect to a matter which it has no power to make. In that case, the challenge was on the constitutionality of the amendment to art. 5(4) of the Federal Constitution. Argument were raised on whether there is restriction imposed on the Parliament to amend some provisions entrenched in the Federal Constitution. The amendment of which provides the basis for the legislation of the impugned law. That being the case, it was held by the Federal Court that, it was a proceeding for a declaration as envisaged by art. 4(3).

[30] We draw some similarities between the OS in the instant appeal with that of *Loh Kooi Choon*. Both this case and as well as the present appeal before us, involved the questioning of the power of the Parliament in amending the Constitution that resulted in the impugned legislation. In the present appeal, what the applicant is saying is that without art. 66(4) the Parliament has no power to pass the Bill (NSCA) as law.

[31] In coming to the conclusion that the challenge in *Loh Kooi Choon* was one as envisaged under art. 4(3) of the Federal Constitution, the Federal Court had referred to the argument by counsel in relation to amendment underlying the impugned law. Wan Suleiman FJ held that the argument by learned counsel that the Parliament cannot amend any of the fundamental liberties articles beyond what is expressly permitted by Part II itself, should be treated as a proceeding for a declaration under art. 4 of the Federal Constitution.

[32] Having considered the cases cited to us both by learned counsel as well as the SFC, we are clear that the challenge by the appellant herein is indeed a challenge on the power of the Parliament. Our view is further reinforced by the second ground of challenge posed by the appellant that NSCA is a law on security, which should have been enacted pursuant to art. 149, it being a law relating to security and public order. This issue to our mind makes it

plainly clear that the challenge herein falls squarely within what is contemplated by art. 4, in that the Parliament has no power to legislate NSCA unless it is enacted pursuant to art. 149.

[33] Article 149 allows the Parliament to enact laws for purposes of preventing situations stipulated under art. 149(1)(a) to (f) of the Federal Constitution, if the laws recite that action has been taken, or threatened by any substantial body of persons. And such laws may be enacted inconsistent with the provisions of arts. 5, 9, 10 or 13, or would be outside the legislative power of the Parliament, apart from art. 149 itself. The argument of the appellant that NSCA may only be enacted pursuant to art. 149 since it relates to security, must necessarily mean that the law-making power of the Parliament itself has been questioned. It is rather intriguing to argue otherwise, and to say that this is not dissimilar to questioning the power of the Parliament to make laws. As such, we are fortified in our view that the application herein comes within the purview of art. 4.

[34] The questioning of the amendment under art. 159 on the doctrine that it cannot alter the basic structure of the Federal Constitution was premised on the 'basic structure' doctrine propounded by the Supreme Court of India in *Kesavananda Bharati Sripadagalvaru & Ors v. State of Kerala & Another* [1973] 1 SCR Supp 1. This argument relates to submission for the appellant that the original art. 66(4) was the basic structure of the Federal Constitution that had been altered. In *Loh Kooi Choon v. Government of Malaysia (supra)*, the Federal Court in dealing with similar challenge had observed that such challenge in substance questioned the validity of the law made by the Parliament, in that the Parliament cannot amend any of the fundamental liberties provision beyond what is expressly permitted by Part II itself, and was treated by the Federal Court as a proceeding envisaged by art. 4(3).

[35] Further to that in the present appeal, the statement pursuant to O. 7 r. 3 of the Rules of Court 2012, the cause of action of the appellant as stated at para. 4 is that "Parliament has no authority to amend the Federal Constitution and in particular art. 66 so as to alter the basic structure". This, in our view cannot be anything else, but it is questioning the power of the Parliament to amend the impugned amendment.

[36] Finally, we note that the reasons for the reliefs sought in the OS is on the basis that the "Parliament has no authority to amend the Federal Constitution in particular art. 66, so as to alter its basic structure" and that, "the NSCA was not enacted in accordance with art. 149 and therefore unconstitutional and void". All these can only mean that the challenge posed by the appellant is questioning the power of the Parliament to legislate the impugned laws which fall squarely under art. 4 read with art. 128 and is therefore within the exclusive jurisdiction of the Federal Court.

[37] Having found so, we abide by the authorities of the Federal Court that the appellant's application is an application questioning the lack of power of the Parliament and called for the invocation of art. 4.

[38] In any event, we hold ourselves bound by decided authorities that even if the appellant can be said to be questioning the excessiveness of power of the Parliament to legislate and not the power to legislate itself the amendment to art. 66(4) and eventually the NSCA is also a matter within arts. 4 and 128, as decided in *Titular Roman Catholic Archbishop* as suggested by both the learned counsel for the appellant as well as the SFC.

[39] On the above reasons, we dismiss the appeal by the appellant and affirm the decision of the learned High Court Judge. We make no order on costs.